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NOTES

CRIMINAL LAW—SEPARATE OFFENSES—FORMER JEOPARDY—*State* v. *Sampson*[1] is in accord with the great weight of authority in holding that if A, at one and the same time, and at one and the same place, steals the goods of B and C, he is guilty of but one offense and a conviction for the theft of B's goods will bar a subsequent conviction for the theft of C's goods. The decisions in a few jurisdictions are *contra* to this, but the reasoning upon which these courts have arrived at their conclusions is hardly convincing. Before looking further into these decisions, it may be well to examine the attitude of the courts toward the somewhat similar problem which arises when several articles all belonging to the same person—as opposed to diverse ownership as in the principal case—are stolen at the same time and at the same place.

The authorities are practically uniform in holding that if two

[1] 138 N. W. Rep. 473 (Ia., 1912).

or more articles are taken successively from the same owner, and such taking is continuous so as to form one transaction the offense is not divisible, but indictable only as a single act. This is the general law in England[2] and in America.[3] Thus, if gas is feloniously drawn during a long space of time from a main pipe by means of a fraudulent pipe, the larceny, being set in motion by a single impulse and operated upon by a single unintermittent force, is one act and not divisible;[4] likewise, where a coal mine has been tapped at one orifice and the operation continued over a series of years.[5] It seems that the Roman law in regard to the stealing of wine from tanks applies the same principle.[6] Where, as a result of a single impulse, a series of articles are removed in the execution of a general fraudulent plan, even though a few minutes of time separate the successive takings, the offense is single;[7] but if so much as half an hour intervene between two takings, there is a new and separate offense.[8] These and similar cases are decided on the theory that the offense committed is the result of a single criminal intent to steal, coupled with a series of acts so closely related in time as to form practically a continuing transaction, and is, therefore, but a single offense and punishable but once. Technically, separate larcenies have been committed in every such case, and the Massachusetts courts have held that separate indictments can be brought.[9] This rule, however, is opposed to the great weight of authority.[10] The argument usually advanced against the Massachusetts doctrine is, that under it the extent of the prisoner's punishment is made to depend entirely upon the will of the prosecutor.[11] Such an argument, standing alone, would hardly be controlling, for in many instances, the prisoner's punishment depends upon the course which the prosecutor chooses to pursue in framing the indictment.

When, now, we turn to the decisions dealing with the question as to whether or not separate indictments can be presented when the several articles are the property of different persons, we discover the somewhat interesting fact that a single statement by Lord Hale is, apparently, the authority on which the earlier cases

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[2] Rex v. Brettel, Car. & M. 609 (1842); Rex v. Knight, 9 Cox C. C. 437 (1862).

[3] Jackson v. State, 14 Md. 327 (1860); Fisher v. Com., 1 Bush 211 (Ky., 1866); State v. Nelson, 29 Me. 329 (1849); Lorton v. State, 7 Mo. 55 (1830); State v. Johnson, 3 Hill 1 (S. C., 1835); State v. Cameron, 40 Vt. 555 (1868); Lisle v. Com., 82 Ky. 250 (1884).

[4] Rex v. Firth, 11 Cox. C. C. 234 (1869).

[5] Rex v. Bleasdale, 2 Car. & K. 765 (1848).

[6] Wharton on Criminal Law, § 1169.

[7] Rex v. Jones, 4 Car. & P. 217 (1830).

[8] Rex v. Birdseye, 4 Car. & P. 386 (1830).

[9] Com. v. Butterick, 100 Mass. 9 (1868); re-affirmed in Meserve v. Com., 137 Mass. 109 (1884).

[10] Wharton on Criminal Law, § 1169.

[11] See argument by the prisoner's counsel in State v. Thurston, 2 McMull 394 (S. C., 1842). Also State v. Hennessey, 23 Ohio, 339 (1872).

on both sides rest. Hale says[12] that "if the prisoner steals the goods of A of the value of 6 d., goods of B of the value of 6 d., and goods of C of the value of 6 d., being perchance in one bundle or upon a table, or in one shop, this is grand larceny, because it is one entire felony, though the persons had several properties, and, therefore, if in one indictment, they make grand larceny." Those courts which hold that separate prosecutions will not lie in such a case, seize upon the words "*because it is one entire felony,*" and argue that if such is the case, then the offense is not divisible and but one indictment will lie.[13] On the other hand, O'Neall, J., in *State* v. *Thurston*,[14] while admitting that for the purpose of proving grand larceny, the different takings might be considered as one act, and therefore one offense, argues that the words *if in one indictment* qualify the statement showing that the larcenies *may* be considered as one offense, and then stoutly contends "that it never entered into the head of the learned Judge, that each of these could not be regarded as *separate petit larcenies.*" The Massachusetts courts have adopted the same view.[15] It is to be noted, however, that the prevailing doctrine in America is *contra.*[16] And it is submitted that the prevailing view is essentially sound. The particular ownership of the property is not of the essence of the crime of larceny. The gist of the offense is the felonious carrying away of property, and the quality of the act is not at all affected by the fact that the property stolen, instead of being a single article, the property of a single individual, consists of several articles which are the property of several individuals.

It follows as a matter of course that in those jurisdictions where the offense is construed to be single, the same count may join the larceny of several distinct articles belonging to different owners, where the time and place of the taking of each are the same,[17] and proof of the stealing of any one will support a conviction and bar a subsequent conviction for the theft of the others.[18] *Com.* v. *Sullivan*[19] permits the prosecutor to indict the defendant for one entire crime, or for several distinct offenses, and intimates that where the indictments are unreasonably multiplied, the court in superintending the course of trial and in passing sen-

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[12] 2nd Hale's P. C. 254.

[13] State v. Williams, 10 Hump. 101 (Tenn., 1849); Wilson v. State, 45 Tex. 76 (1876); Lorton v. State, 7 Mo. 55 (1841); State v. Newton, 42 Ver. 537 (1870); State v. Larson, 85 Ia. 659 (1892).

[14] 2 McMull. 397 (S. C., 1842).

[15] Com. v. Sullivan, 104 Mass. 553 (1870).

[16] See 13, *supra.*

[17] Stevens v. State, 62 Me. 284 (1873); State v. Hennessey, 23 Ohio, 339 (1872).

[18] State v. Pednan, 68 Vt. 109 (1896); State v. Clark, 32 Ark. 231 (1878). As to effect of fraudulently procuring a conviction before a magistrate for a lesser element of the offense in order to bar subsequent indictment for the whole offense, see Bradley v. State, 32 Ark. 722 (1878), and Univ. of Penna. Law Review, Vol. 45, page 198.

[19] 104 Mass. 553 (1870).

tence, will see that justice is done and oppression prevented. It is rather difficult to see why, under this view, an indictment for the offense as a whole, alleging the articles to be the property of various persons, is not bad for duplicity.

H. W. W.

EASEMENTS—RIGHT OF WAY—ALTERATION OF USER—INCREASE OF BURDEN—Easements, being rights in and over the lands of others, are distinguished from corporeal hereditaments primarily in the restrictive uses to which they may be put. In this connection, there arises one of the many vexing problems in the law of real property. It is, when the user of a right of way has once been acquired, to what extent, if any, may it be altered. The latest decision on the subject, at least in the English courts, is *White* v. *Grand Hotel, Limited.*[1] In that case, a right of way for general purposes was granted by express agreement, although not in writing. At the time of the grant, the dominant tenement consisted of a private dwelling-house and garden and the way was used as a means of access to the road. Subsequently, the cottage and garden were purchased by an adjoining hotel, which turned the building into a garage and used the right of way for the automobile entrance. The plaintiff claimed that the passing of so many automobiles unduly increased the burden on the servient tenement. But the court decided that the generality of the grant admitted of this altered user.

The construction and extent of the user of a right of way depend largely upon the method of creation of the easement. It may arise by prescription or by express grant. The user growing out of prescription is *strictissimi juris, i. e.*, it is to be confined to those users only which gave rise to the prescriptive right.[2] As James, L. J., puts it, in *Wimbledon Conservators* v. *Dixon*,[3] "no such change in the character of a dominant tenement could be made as would increase the burden on the servient tenement. . . . The way ought to be used only for the purposes for which it was used when the land was in a state in which it was formerly."

When the right of way exists by virtue of an express grant, the words of the grant must determine the extent of the user;[4] but if the grant is in any way ambiguous, the familiar principle applies that a grant shall be construed most strongly against the grantor.[5] If the grant is general, then it seems the user is unrestricted as to quality or quantity so long as its substance is not changed.[6] Our principal case falls under this head.

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[1] L. R. (1913) 1 Ch. 113.

[2] Ballard v. Dyson, 1 Taunt. 279 (Eng., 1808); Wimbledon Conservator v. Dixon, 45 L. J. Ch. 353 (Eng., 1875); Bradburn v. Morris, 3 Ch. Div. 812 (Eng., 1876); Atwater v. Bodfish, 77 Mass. 150 (1858).

[3] 45 L. J. Ch. 353 (Eng., 1875).

[4] Washburn v. Copeland, 116 Mass. 233 (1874); Taylor v. Hampton, 4 McCord 96 (So. Car., 1827); Williams v. James, L. R. 2 C. P. 577 (Eng., 1867).

[5] Gonson v. Healy, 100 Pa. 42 (1881).

[6] United Land Co. v. Great Eastern Ry. Co., L. R. 10 Ch. 586 (Eng., 1875).